SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 170

THE UNITED STATES, PETITIONER

vs.

PENNER INSTALLATION CORPORATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

INDEX

	Original	Page
Record from United States Court of Claims	1	Cover
Petition	1	1
Exhibit "A"—Contract dated September 28, 1944, between the United States of America and Penner Installation Corporation	7	1
General traverse	25	14
Argument and submission	25	14
Special findings of fact	27	14
Conclusion of law	37	23
Opinion, Whitaker, J	37	23
Judgment	41	26
Proceedings after entry of judgment	43	26
Opinion on motion for new trial, Whitaker, J	45	26
Final judgment	53	31
Clerk's certificate (omitted in printing)	55	31
Order allowing certiorari		32

913925—50

894083—50——1

1 In the Court of Claims of the United States

No. 47266

PENNER INSTALLATION CORPORATION, CLAIMANT

v.

UNITED STATES OF AMERICA, DEFENDANT

Petition

Filed August 9, 1946

To the CHIEF JUSTICE AND JUDGES OF THE COURT OF CLAIMS:

The petition of Penner Installation Corporation respectfully alleg and shows to this court as follows:

1. That claimant is a corporation duly organized and existing under and by virtue of the laws of the State of New York.

2. That no assignment or transfer of the claims hereinafter set forth or any part thereof has been made.

3. That your claimant has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided or abetted or given encouragement to rebellion against the United States.

4. That heretofore and under date of September 28, 1944, claimant as contractor duly entered into a contract with the
2 defendant for the furnishing of the materials and the performance of the work for constructing a series of lighting systems consisting of installation of runway marker lights and supplementary facilities, at the Port Erie Airport, Erie County, Erie, Pennsylvania, Schedule 1, Proposal No. 1–45–400, pursuant to Specifications and Drawings attached thereto and all Addenda thereto. An exact copy of this contract is annexed hereto and marked Exhibit "A".

5. That claimant has duly performed all the terms and conditions of said contract on its part to be performed, except as prevented, interfered with and delayed by the breaches and violations of the contract on the part of the defendant, as more particularly set forth in paragraph numbered "6" hereof.

6. That the defendant breached and violated the terms of the said contract, in that it arbitrarily, unlawfully and contrary to the provisions of the contract, plans and specifications, required the claimant to perform and furnish labor and materials not called for by said Contract, Plans and Specifications; that it required claimant to furnish labor and material in a manner contrary to the quality, quantity and method called for in the Contract, Plans

and Specifications; arbitrarily and unreasonably classified various items of work erroneously and failed and refused to pay for the proper classification and value of the work performed; required the claimant to perform the work in a manner contrary to the requirements of the contract and in a far more costly and expensive manner; made material and substantial changes in the plans, drawings, nature and kind of work to be done; interfered with claimant's performance of its work; and generally interfered with and delayed claimant in the performance of its work and the
3 completion of its contract; deliberately withheld payments from the claimant for long periods of time after said payments were properly due and payable; deliberately underpaid claimant and underestimated the amount and value of labor and material furnished and performed by the claimant; and failed to pay for the full value of all labor and materil furnished and performed by claimant under the proper classifications thereof. That the defendant's actions caused claimant damage as follows:

Underpayment on following items under contract classifications:

(a) 3–12 (a)	$380.00
(b) 3–141 (c)	1,448.85
(c) 3–141 (d)	6,280.00
(d) 3–141 (e)	197.00
(e) 3–141 (h)	96.00
(f) 3–141 (l)	19.95
(g) 3.12 (k)	1,550.58
(h) 3.12 (l)	1,255.30
(i) 3.12 (m)	431.97
(j) 3.12 (n)	453.75
(k) 3.12 (o) #1	85.19
(l) 3.12 (o) #2	179.98
(m) 3.12 (o) #3	728.35
(n) 3.12 (o) #4	181.60
	$13,288.52

The following extra and additional work and damages suffered because of improper classifications and requirements as hereinabove set forth:

4 Assembling Government furnished Condulets, els, conduit nipples, etc. for obstruction Lighting	$53.28
Installation of 90 Degree 1¼ inch-conduit els, at Marker Light Units	641.37
Installation of 1¼ inch-Conduit for Obstruction Lighting	1,307.20
Installation of Structural Steel Supports and Bands for Isolation Transformers	165.66
Installation of Overhead #4 Wires on Poles outside of Fence near Ford Avenue	82.88
Chipping Macadam Pavement around Light Pads and repairs to same	958.01
Temporary and Permanent repairs to Ceiling Light Cable	348.04
Smoothing and Grading the Area around 89 Series Flush Contact Lights to provide free drainage of surface water away from the pads	326.00

	Extra cost involved in complying with exception list issued after job had been completed and accepted and all exceptions originally issued had been complied with	$71.63	
5	General Interference and Delay	2,397.00	
	Interest on moneys concededly due Claimant and arbitrarily and unreasonably withheld for long periods of time	500.00	
			$6,851.07
	Total		20,139.59

7. That no part of said sum of $20,139.59 has been paid, although the same is now due and owing.

8. That the claims as hereinabove set forth were duly presented to the Contracting Officer and duly appealed to the Secretary of Commerce within the time provided by said contract, and Claimant took all steps as required by said contract to have the actions of the defendant reviewed in accordance with the terms thereof. That the defendant has failed and refused to pay said claims. That no other action on said claims has been had either in Congress or in any of the Departments, except as above set forth.

9. That the claimant has the sole right to prosecute the same; that no assignment or transfer of said claim or any part thereof or interest therein has been made, nor has any part thereof been paid; that claimant is justly entitled to the amount claimed from the defendant as herein set forth.

10. That more than six years have not elapsed since claimant's cause of action has accrued herein.

11. That by reason of the aforesaid, there is now due and owing from the defendant to the claimant the sum of $20,139.59.

6 Wherefore, claimant, Penner Installation Corporation, demands judgment in the sum of $20,139.59, with interest thereon.

PENNER INSTALLATION CORPORATION,
Claimant.

M. CARL LEVINE, MORGULAS & FOREMAN,
Attorneys for Claimant.

By ALBERT FOREMAN,
Member of Firm.

7 *Exhibit to petition*

Contract No. Clca–4802
Negotiated Contract

CONTRACT

(Construction)

Penner Installation Corporation
Cantiague Road
Hicksville, New York

(Contractor)

Department of Commerce
Civil Aeronautics Administration
385 Madison Avenue
New York 17, New York

(Department)

Contract for: Constructing Series Lighting System

Estimated
Amount, $8,405.50

Place: Port Erie Airport, Erie County, Erie, Pennsylvania

CONTRACT FOR CONSTRUCTION

This Contract, entered into this 28th day of September 1944, by The United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and Penner Installation Corporation, a corporation organized and existing under the laws of the State of New York, of the city of Hicksville, Long Island, in the State of New York, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

ARTICLE 1. *Statement of work.*—The contractor shall furnish the materials, and perform the work for construct-
8 ing a series lighting system consisting of installation of runway marker lights and supplementary facilities at the Port Erie Airport, Erie County, Erie, Pennsylvania, located about seven (7) miles South of the City of Erie, Pennsylvania, in accordance with Schedule I, Proposal No. 1–45–400 for the consideration of the estimated sum of Eight Thousand Four Hundred and Five Dollars and Fifty Cents ($8,405.50), the contractor to be paid for actual quantities at unit prices originally quoted in Schedule I, Proposal No. 1–45–400 in strict accordance with the specifications, schedules, and drawings, all of which are made a

part hereof and designated as follows: Bid on Proposal No. 1–45–400, including the specifications and drawings specified therein and attached hereto.

The work shall be commenced within ten (10) calendar days from the effective date of the Notice to Proceed and shall be completed within forty-five (45) calendar days from the effective date of the Notice to Proceed.

ARTICLE 2. *Specifications and drawings.*—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specification shall govern. In any case of discrepancy in the figures, drawings, or specifications, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided.

9 ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however,* That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for

in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

ARTICLE 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

ARTICLE 6. *Inspection.*—(*a*) All material and workmanship (if not otherwise designated by the specifications) shall be subject to inspection, examination, and test by Government inspectors at any and all times during manufacture and/or construction and at any and all places where such manufacture and/or construction are carried on. The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the contractor shall promptly segregate and remove the rejected material from the premises. If the contractor fails to proceed at once with the replacement of rejected material and/or the correction of defective workmanship the Government may, by contract or otherwise, replace such material and/or correct such workmanship and charge the cost thereof to the contractor, or may terminate the right of the contractor to proceed as provided in article 9 of this contract, the contractor and surety being liable for any damage to the same extent as provided in said Article 9 for terminations thereunder.

(*b*) The contractor shall furnish promptly without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not unnecessarily to delay the work. Special, full size, and performance tests shall be as described in the specifications. The contractor shall be charged with any additional cost of inspection when material and workmanship is not ready at the time inspection is requested by the contractor.

(*c*) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the contractor shall on request promptly furnish all necessary facilities, labor, and material. If such work

is found to be defective in any material respect, due to fault of the contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual cost of labor and material necessarily involved in the examination and replacement, plus 15 percent, shall be allowed the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(*d*) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures from specific requirements of the contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the
12 requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site.

ARTICLE 7. *Materials and workmanship.*—Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose. Where equipment, materials, or articles are referred to in the specifications as "equal to" any particular standard, the contracting officer shall decide the question of equality. The contractor shall furnish to the contracting officer for his approval the name of the manufacturer of machinery, mechanical and other equipment which he contemplates incorporating in the work, together with their performance capacities and other pertinent information. When required by the specifications, or when called for by the contracting officer, the contractor shall furnish the contracting officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Machinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The contracting officer may require the contractor to remove from the work such employee as the contracting officer deems incompetent, careless, insubordinate, or otherwise objectionable, or whose continued employment on the work is deemed by the contracting officer to be contrary to the public interest.

ARTICLE 8. *Superintendence by contractor.*—The contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him.

13 ARTICLE 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue to work, in which event it will be impossible to determine the actual damages for the delay and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or

14 delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning of any such delay (unless the contracting officer, with the approval of the head of the department or his duly authorized representative, shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties

hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

ARTICLE 10. *Permits and responsibility for work.*—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for all materials delivered and work performed until completion and final acceptance. Upon completion of the contract the work shall be delivered complete and undamaged.

ARTICLE 11. *Eight-hour law—Overtime compensation—Convict labor.*—(*a*) No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work at the site thereof, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this article. The wages of every laborer and mechanic employed by the contractor or any subcontractor engaged in the performance of this contract shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this article a penalty of five dollars shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this article, and all penalties thus imposed shall be withheld for the use and benefit of the Government: *Provided*, That this stipulation shall be subject in all respects to the exceptions and provisions of U. S. Code, title 40, sections 321, 324, 325, 325a, and 326, relating to hours of labor and compensation for overtime.

(*b*) The contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

ARTICLE 12. *Covenant against contingent fees.*—The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give

the Government the right to terminate the contract, or, in its discretion, to deduct from the contract price or consideraion the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

ARTICLE 13. *Other contracts.*—The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

ARTICLE 14. *Officials not to benefit.*—No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

ARTICLE 16. *Payments to contractors.*—(*a*) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.

(*b*) In making such partial payments there shall be retained 10 percent on the estimated amount until final completion and acceptance of all work covered by the contract: Provided however, That the contracting officer, at any time after 50 percent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: And provided further, That on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

(*c*) All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the contractor from the sole responsibility for all materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Governmet to require the fulfillment of all of the terms of the contract.

(*d*) Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract,
18 other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

ARTICLE 17. *Rate of wages.*—(In accordance with the act of August 30, 1935, 49 Stat. 1011, as amended by the act of June 15, 1940, 54 Stat. 399 (U. S. Code, title 40, secs. 276a and 276a–1), this article shall apply if the contract is in excess of $2,000 in amount and is for the construction alteration, and/or repair, including painting and decorating, of a public building or public work within the geographical limits of the States of the Union, the Territory of Alaska, the Territory of Hawaii, or the District of Columbia.)

(*a*) The contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics; and the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work. The contracting officer shall have the right to withhold from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

19 (*b*) In the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the con-

tract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

(*c*) The regulations of the Secretary of Labor, referred to in article 19 hereof, allow certain "permissible deductions" from the wages required by this article to be paid.

ARTICLE 18. *Domestic preference.*—In the performance of the work covered by this contract the contractor, subcontractors, material men or supplies shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States. The foregoing provision shall not apply to such articles, materials, or supplies of the class or kind to be used or such articles, materials, or supplies from which they are manufactured, as are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or to such articles, materials, or supplies as may be expected by the head of the department under the proviso of title III, section 3, of the act of March 3, 1933, 47 Stat. 1520 (U. S. Code, title 41, sec. 10b).

20 ARTICLE 19. *Nonrebate of wages.*—The contractor shall comply with the regulations of the Secretary of Labor pursuant to the act of June 13, 1934, 48 Stat. 948 (U. S. Code, title 40, secs. 276b and 276c), and any amendments or modifications thereof, shall cause appropriate provisions to be inserted in subcontracts to insure compliance therewith by all subcontractors subject thereto, and shall be responsible for the submission of affidavits required of subcontractors thereunder, except as the Secretary of Labor may specifically provide for reasonable limitations, variations, tolerances, and exemptions from the requirements thereof.

ARTICLE 20. *Additional security.*—Should any surety upon any bond furnished in connection with this contract become unacceptable to the Government, or if any such surety shall fail to furnish reports as to his financial condition from time to time as requested by the Government, the contractor must promptly furnish such additional security as may be required from time to time to protect the interests of the Government or of persons supplying

labor or materials in the prosecution of the work contemplated by the contract.

ARTICLE 21. *Definitions.*—(*a*) The term "head of the department" as used herein shall mean the head or any assistant head of the executive department or independent establishment involved, and the term "his duly authorized representative" shall mean any person authorized to act for him other than the contracting officer.

(*b*) The term "contracting officer" as used herein shall include his duly appointed successor or his authorized representative.

21 ARTICLE 22. *Alterations.*—The following changes were made in this contract before it was signed by the parties hereto:

The sentence reading "No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative" in Article 3 of U. S. Standard Form 23 entitled "Changes" is hereby deleted.

THE UNITED STATES OF AMERICA,
By: A. J. MASSARI,
A. J. MASSARI,
Administrative Officer.
(Official title)
PENNER INSTALLATION CORPORATION,
By: ISAAC PENNER,
Contractor.
Title: *President.*
Hicksville, N. Y.
(Business address)

Two witnesses:
SYLVIA PENNER.
BERTHA KATZ.

22 I, Sylvia Penner, certify that I am the secretary of the corporation named as contractor herein; that Isaac Penner, who signed this contract on behalf of the contractor, was then President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

[CORPORATE SEAL] SYLVIA PENNER.

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, Isaac Penner, who signed this contract for the Penner Installation Corporation, had authority

to execute the same, and is the individual who signs similar contracts on behalf of this corporation with the public generally.

A. J. Massari,
A. J. Massari,
Administrative Officer.

This contract is authorized by the acts of Public Law No. 365—78th Congress, Chapter 294—2nd Session, H. R. 4204.

23 Duly sworn to by Isaac Penner; jurat omitted in printing.

25 *General traverse*

Filed September 18, 1946

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(s) John F. Sonnett,
Assistant Attorney General.

E. E. N.
J. B. M.
E. E. E.

Argument and submission of case

On May 3, 1949, the case was argued and submitted on merits by Mr. Albert Foreman for plaintiff, and by Mr. John R. Franklin for defendant.

27 *Special findings of fact, conclusion of law and opinion of the court by Whitaker, J.*

Filed October 3, 1949

Mr. Albert Foreman for plaintiff. Messrs. M. Carl Levine, Morgulas & Foreman were on the brief.

Mr. John R. Franklin, with whom was Mr. Assistant Attorney General H. G. Morison, for the defendant.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

SPECIAL FINDINGS OF FACT

1. On September 28, 1944, plaintiff, a corporation organized under the laws of the State of Delaware, entered into a contract with the defendant for the furnishing of part of the materials and the performance of work for the construction of a certain lighting system at the Port Erie Airport, Erie, Pennsylvania.

The contract provided that the work was to be completed within 45 days from the notice to proceed, which notice to proceed was given effective October 4, 1944.

2. The Instructions to Bidders in the proposal for the contract included the following:

"1. *Preparation of bids.*—Unless otherwise directed in the invitation, bids shall be submitted in triplicate. Forms furinshed, or copies thereof, shall be used, and strict compliance with the requirements of the invitation, these instructions, and the instructions printed on the forms is necessary. Special care should be exercised in the preparation of bids. Bidders must make their own estimates of the facilities and difficulties attending the performance of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies. All
28 designations and prices shall be fully and clearly set forth. Copies of the bids shall be identical. The proper blank spaces in the bid and guaranty forms shall be suitably filled in.

"2. Labor and material not to be furnished by the Government.—The Government will not furnish any labor, material, or supplies unless specifically provided for in the contract."

The contract contained the following provisions:

"ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: Provided, however, That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

* * * * *

"ARTICLE 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

* * * * *

"ARTICLE 10. *Permits and responsibility for work.*—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for all materials delivered and work performed until completion and final acceptance. Upon completion of the contract the work shall be delivered complete and undamaged.

* * * * *

29 "ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

The Special Proposal Conditions which formed part of the contract contained the following:

"1.7 *Quantities and unit prices:* The quantities noted in the schedule of items are approximations for comparing bids, and no claims shall be made against the United States for excess or deficiency therein, actual or relative. Payment at the unit prices agreed upon will be in full for the work completed and will cover materials, supplies, labor, tools, machinery and all other items of expenditure incident to satisfactory performance of the contract, unless otherwise specifically provided."

3. After the work was completed but before final payment, the plaintiff, under date of June 20, 1945, presented to the Civil Aeronautics Administration an itemized statement of amount claimed to be due. On November 15, 1945, the defendant granted an allowance on a few of the items but denied the remainder. On November 28, 1945, plaintiff appealed to the Secretary of Commerce, but the decision of November 15 was sustained. The items set forth in the petition were listed in the statement of June 20, 1945.

Obstruction Lights on Poles

Contract item 3.12 (a)

4. Work involved under this item was the installation of the obstruction lights on the poles, together with the necessary conduit. The work, except for connecting the wires to the sockets, was the same whether a single or double light was furnished.

In a number of places the plans called for double lights. However, double lights were not then available. For the places where
30 the plans called for double lights, the defendant furnished for the work two single lights and certain fittings by means of which the two lights could be assembled as one double light. It was the plan of the defendant to have this assembling done by defendant's employees at the field, and a few were so assembled. However, plaintiff's president volunteered to have the work done by its employees at times when those employees could not be employed on the contract work because of inclement weather. Thus plaintiff assembled most of the double lights. A total of 15 double lights was thus assembled, using 30 single lights and the necessary fittings. These 15 double lights and 11 single lights, or a total of 26 light units on the poles, were installed. Under this item the plaintiff was paid for 24 installations at $20 each. The other two double lights were installed in connection with another item (3.12 (n)), for which payment was made. (See finding 11.)

Fair and reasonable compensation for assembling these lights was $16.00.

6" x 18" Trench

Contract items 3.1§1 (c)

5. As a part of the work, it was necessary to dig trenches around the three runways and at certain other places on the field in order to bury the cable which carried the current to the lights. The contract provided a unit price of 13 cents per lineal foot for a 6" x 18" trench. The defendant paid the plaintiff for 23,855 lineal feet. This was in part based on measurements purported to have been made by the city engineers of Erie, Pennsylvania. The evidence establishes that a total of 27,296 lineal feet was actually excavated. The plaintiff was therefore underpaid on this item to the extent of 3,441 lineal feet.

Cable Trench in Excess of 6" x 18"

Contract item 3.1§1 (d)

6. The contract provided that for any trenches excavated for the work in excess of 6" x 18", the plaintiff would be paid
31 $5 per cubic yard. The evidence establishes that plaintiff excavated 629 cubic yards of such excess size trenching, which was 426 cubic yards more than the 203 cubic yards for which it was paid.

Cable in Trench

Contract item 3.14½ (e)

7. The contract provided for the payment to plaintiff of two cents per lineal foot for placing the cable in the trench. The computation of the length of the cable placed in the trench was predicated on the computation of the lineal feet of trench dug for it, and the evidence establishes that there were 35,071 feet of cable actually placed, including the amount necessary for the required loops at the various lights and five percent allowance for slack. The plaintiff was paid for 34,395 feet, there being an underpayment of 676 feet.

Cable Splices

Contract item 3.14½ (h)

8. The contract provided a unit price of $16 for a cable splice. There were actually 29 cable splices made in connection with the work. Under this particular item the plaintiff was paid for 23 splices. Six splices were made in connection with repairs to an existing cable, which was cut in connection with the excavating of the trenches, as set out in finding 19.

Clearing Ducts

Contract item 3.14½ (i)

9. As a part of plaintiff's work on the airfield, it was necessary to put the cable through some existing ducts. These ducts were partially filled with mud and other debris and plaintiff was ordered in writing to clear the ducts. A price for doing the work was to be determined later. The price was later fixed at 19 cents per lineal foot. The evidence establishes that there was a total of 5,495 feet of duct cleared, which was the amount for which the plaintiff was paid.

Driving Conduit Under Road

Contract items 3.12 (k) and 3.12 (l)

10. After the work was started the plans were changed so as to make it necessary to install 2-inch conduit under 12th
32 Street and also under Ford Avenue, the boundary lines of the airfield. Under 12th Street, 60 feet of such conduit were installed, and 40 feet were installed under Ford Avenue. This work was ordered in writing and plaintiff was requested to submit a price for doing the work, which price was submitted

after the work had been completed. Plaintiff first submitted a price under date of November 18, 1944, of $32 per lineal foot, although it later and formally agreed to do the work for $6 per lineal foot. It now contends that a fair and reasonable value for doing this work is $35.80 per lineal foot. Defendant fixed the price of $4 per lineal foot and paid plaintiff on that basis for the agreed length of the two conduits. The evidence establishes that a fair and reasonable price for doing this work is $8 per lineal foot.

Remove Wood Poles and Reduce Height of Existing Poles

Contracts items 3.12 (m) and 3.12 (n)

11. Some of the existing obstruction lights at the airfield were deemed to be too high and plaintiff was ordered in writing to remove some of these poles and reduce the height of others. The work involved in removing the poles was the removal of the hardware and the wire from the poles and disposal of the poles after the work was done. Before the work was undertaken, plaintiff submitted a price of $100 a pole for the work of removing the poles. This price was not agreed to by the defendant, but the plaintiff proceeded with the work. After the work was performed, plaintiff submitted another price which amounted to $183.99 for each of the poles removed. Four poles about 40 feet high were actually removed, and the defendant fixed the price at $30 each. This amount is not less than a fair and reasonable price for the work performed. As a part of this work the plaintiff was also directed to reduce the height of two other poles. This involved removing the lights and wire and other fittings, cutting off the top of the pole and reinstalling the accessories. Before the work was done, plaintiff bid $190 per pole, and after the work was performed, plaintiff submitted a break-down of prices showing a price of $271.88 per pole. Two poles were actually reduced in height. On these poles, in place of the existing single
33 lights, double lights were installed. The double lights were assembled lights, as set out in finding 4.

For this work the defendant fixed a price, including the lights, of $45 per pole, and plaintiff was paid on this basis. The amount paid is not less than a fair and reasonable price for the work.

Furnish and Install Wood Poles

Contract item 3.12 (o)

12. Plaintiff originally bid $70 to furnish and install poles, but after the bid was submitted, the plaintiff was told that no poles

would be required, and at the Government's request plaintiff reduced the bid for this item to $35 per pole. This was done to *lower the total cost of the estimated work at the airport.* After the work had started, it was decided to place some poles near the ends of the runways, and plaintiff was directed to furnish and install them. The work was actually ordered by Equalization Order of November 14, 1945. A total of 12 poles of varying lengths between 18 and 30 feet was installed pursuant to the directions. After two of the poles had been installed, the lighting was again rearranged so that these two poles had to be reduced in height. This work was done during the winter time and the painting of the poles was postponed until the spring. Under the conditions under which the work was performed, a fair and reasonable price for the work is $70 per pole. Plaintiff was paid for the 12 poles at the reduced bid price of $35 per pole.

EXTRAS

Installation of 90° Bends at Contact Lights

13. The contact lights furnished by the defendant had fiber conduit at the bottom to lead the wire into the light sockets. The drawings showed this fiber conduit as extending from the base of the light along a 180° angle, parallel to the center line of the runway, which, if used, would have required a trench from each side of the light to the parallel trench 7 feet outside the runway. The specifications have an addendum as follows:

"IV–A. *Installation on concrete pads:* 1. On contracts
34 where the contractor has on hand a surplus of steel conduit, steel conduit may be substituted for the fibre duct and the concrete envelope specified on Drawing ANC–1014."

Plaintiff had on hand sufficient 90° steel conduit which he used in place of the fiber conduit which was furnished by the defendant with the light fixtures. Using these bends on the lights allowed both wires to come into the lights on the side away from the runway and obviated the necessity of bending the fiber conduit furnished with the lights to meet the cable in the trench. The defendant did not require plaintiff to furnish the bends and they were used by plaintiff of its own volition to simplify the work.

Install 1¼" Conduit

14. Contract item 3.12 (b) required the installation of wire and steel 1-inch conduit at a unit price of 60 cents per lineal foot. The cable furnished to go in this conduit was of such over-all diameter that difficulty was experienced in placing two such cables in the 1-inch conduit. The plaintiff was requested to furnish 1¼-

inch conduit for the work, and plaintiff was paid at the price of 65½ cents for 469 feet of 1¼-inch conduit in lieu of 1-inch conduit, and for 150 feet of 1-inch conduit at the unit price of 60 cents per foot. The 150 feet paid for at 60 cents per foot was actually 1¼-inch conduit, and the difference in price would amount to $7.15 for this 150 feet. The evidence establishes that a total of 490 feet was installed, for which the plaintiff was paid for 469 feet only, making a total of 21 additional feet for which the plaintiff has not been paid. The amended contract price for this 21 feet was $13.76. Plaintiff was underpaid for this item in the amount of $20.91.

Install Steel Supports for Transformers

15. The specifications attached to the contract required that six transformers, to be furnished by the Government and installed by the plaintiff, be installed in the vaults with expansion bolts. When plaintiff was building the concrete vaults for these transformers, no detailed information or templates showing the location of the expansion bolts were available to plaintiff, so plaintiff built the vaults without inserting the expansion bolts before pouring the concrete. When the transformers were furnished, it was found that they had been furnished without supporting bands. Plaintiff was directed to procure bands and drill holes in the concrete sides in which to place the expansion bolts. The Government recognized a liability for failure to furnish supporting bands with the transformers and actually paid the plaintiff $3 each for six such bands. The evidence does not establish a fair and reasonable price for furnishing the bands, but it does establish that 12 such bands were furnished.

Install Overhead Wire

16. At the northeast end of runway No. 3 the Government directed that overhead wires be installed in place of buried cable. The wire was furnished by the Government and the plaintiff performed the work. The Government computed a fair and reasonable price for the performance of this work as $18.14. The evidence fails to establish that this price was less than a fair and reasonable price.

Chipping Macadam Pavement Around Contact Light Pads

17. The outer edges of the macadam runway around which plaintiff was to install the contact lights were not in a line parallel to the center line of the runway. The defendant's engineer staked out the location of the lights along this runway, and plaintiff, in order to place the center of the lights at the designated points,

was required to chip away the irregular macadam edges. The installation of the lights at the places marked required the chipping away of from four to six inches of the macadam in the case of most of the lights. A fair and reasonable price for this work was $329.16. Plaintiff was not paid anything extra for this work. Had the runway been constructed with regular edges parallel to the axis of the runway, the lights could have been installed adjacent to the runway as shown on the drawings without the necessity for this chipping. A careful investigation of the edges of the runway, if it included removing the dirt or sod adjacent, would have disclosed the irregular edges. The staking out of the location for the lights was done after the contract was signed.

36 Repairs to Ceiling Light

18. While excavating trenches along the line indicated by the Government engineer, the plaintiff's excavating machine cut a buried cable which controlled the ceiling light. Thereafter plaintiff excavated in this location by hand labor, but the cable light was cut in approximately three places. Plaintiff made the necessary splices and restored the ceiling light to operation. The location of the buried cable to the ceiling light was not indicated on the plans nor was it obvious on the ground. However, after the cable had first been cut, plaintiff's attention was called to a slight indentation in the ground and was advised that this marked the trench in which the buried cable was located. The excavation made necessary to repair the ceiling light cable was allowed as a part of the extra excavation. The contract price for the splices was $16 each.

Smoothing and Grading Around Lights

19. After the lights around the runways were installed, it was found that the areas immediately surrounding the lights were lower than the previous grade along the sides of the runway. This resulted from the excavations which plaintiff made to install the lights. When the excavation was in process, the earth excavated was cast outward, and after the lights were installed this earth was not all brought back to its former location. As a result, surface water did not drain away from the areas of the lights. Plaintiff was required to smooth out the obstructions to the drainage so as to restore the area to the condition it was in before excavating for the lights. Plaintiff performed this work at an approximate cost of $200.

Exception List

20. Inspection of the project was made on December 10, 1944, and plaintiff was notified of certain small items which were not in conformity with the specifications. Plaintiff corrected all such nonconformities. The cost of doing this is not established by the evidence.

37 Interference and Delay

21. The contract was completed sufficiently to permit the lights to be turned on by November 18, 1944, which was one day after completion date, and thereafter plaintiff performed certain minor items of contract work, including certain extras ordered, with two or three men up to December 10, when the final inspection was held. Thereafter plaintiff did additional work in connection with the items to which exception had been taken. The painting of certain poles and one or two other minor items was by agreement postponed until the following spring.

During the performance of the contract considerable extra work was ordered by the defendant and the estimated quantities of work were exceeded in many cases. This work required the extra time.

For about two or three weeks there was a shortage of cable for the work, but during such time plaintiff was engaged in other work on the contract.

Plaintiff was not delayed in the completion of work except for the overrun on the contract items and the extra work ordered.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover, and it is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of three thousand eight hundred ten dollars and ninety-two cents ($3,810.92).

Opinion

WHITAKER, Judge, delivered the opinion of the court:

Plaintiff entered into a contract with the defendant through the Civil Aeronautics Administration for the construction of a lighting system at Port Erie Airport, Erie, Pennsylvania. Plaintiff says that defendant's measurements of the work done at unit prices were incorrect in a number of different instances,

38 and that in other instances the unit price fixed for the work done was too low, and in other instances the price paid for extra work ordered was too low.

We find it unnecessary to comment on each and every item. Suffice it to say that we have carefully reviewed the commissioner's report and the exceptions thereto taken by both the plaintiff and the defendant, and, except in the instances noted below, we are of the opinion that the weight of the evidence is not against the commissioner's findings, and we have, accordingly, adopted his findings, with only minor exceptions.

The contract required the installation of obstruction lights on poles, some of which were to be double lights. The defendant, however, was unable to obtain double lights, but furnished instead two single lights where a double light was required. The work of assembling these two single lights so as to make a double light was the defendant's responsibility, but the plaintiff volunteered to do this work with its own workmen. This was acquiesced in by the defendant. Since this was the defendant's responsibility and it permitted the plaintiff to do the work, the defendant is liable for the payment of reasonable compensation therefor. We have found that $16.00 is reasonable compensation.

In finding 7 we have found that plaintiff was not paid for 676 feet of cable placed in the trenches. The commissioner found that plaintiff had not been paid for 644 feet, but he made no allowance for slack in the cable, which has been computed at 5 percent, making a total of 676 feet.

In finding 10 we have adopted the commissioner's finding of $8.00 a lineal foot as a fair and reasonable price for driving the conduits under 12th Street and Ford Avenue. The plaintiff at first submitted a bid for $32.00, but there was no agreement on this price. We are of opinion that the $4.00 allowed by the defendant is too low, and that $8.00 is a reasonable price for doing this work.

Plaintiff makes claim for the cost of the 90° bends which it used instead of the fiber conduit furnished by the defendant to enclose the wires from the lights to the cable in the trench. Under the specifications plaintiff was permitted to substitute steel conduits for the fiber conduits. It had on hand the steel conduits and found it easier to do the work by using them
39 than to use the fiber conduits furnished by the Government. It used the 90° steel conduits of its own volition, and not at the order of the defendant and it is not entitled to recover for the cost of them.

In finding 17 we have found that the fair and reasonable price for chipping macadam off the edges of the runway was $329.16, instead of the commissioner's figures of $444.56. It appears that

the commissioner figured this cost at $4.22 a light for 78 lights, but in doing so he made an error in calculation, the correct figure being $329.16 instead of $444.56.

In excavating the trenches the plaintiff cut a buried cable which controlled the ceiling light. The location of this buried cable was not shown on the plans and it was not obvious on the ground. However, after it had been cut, defendant's engineer on the job called to plaintiff's attention an indentation in the ground which he said indicated the trench in which the cable for this ceiling light had been buried. After this had been called to plaintiff's attention, it was easy to follow the course of the trench. However, plaintiff cut this cable five times thereafter. It is entitled to compensation for repairing it as a result of the first cutting because the location of it was not shown, but it is not entitled to recover the subsequent cuttings of it, because by the exercise of due care this could have been avoided.

Plaintiff is not entitled to recover for the cost of smoothing and grading around the lights. This was made necessary because plaintiff in excavating for trenches piled up the dirt in such a way as to prevent the water from draining from the lights. It was a part of its duty to restore the land around these lights to its previous grade, and it is not entitled to compensation for doing so.

The contract was completed one day after the completion date. This extra day was made necessary on account of the extras ordered by the defendant. Plaintiff, however, says it could have completed the work earlier had the defendant not interfered with it. We find no evidence of interference. Nor was it any part of defendant's duty to make it possible for plaintiff to complete its work prior to the completion date. United States v. Blair, 321 U. S. 730.

40 As shown by the findings, we conclude that there is due the plaintiff the sum of $3,810.92, which is composed of the following items:

Cost of assembling lights (finding No. 4)	$16.00
6" x 18" trench excavation not paid for (finding No. 5)	447.33
Trenches in excess of 6" x 18" not paid for (finding No. 6)	2,130.00
Cable in trench, not paid for (finding No. 7)	13.52
Cable splices (findings 8 and 18)	16.00
Driving conduit under road (finding No. 10)	400.00
Furnishing and installing poles (finding No. 12)	420.00
1¼" conduit not paid for (finding No. 14)	20.91
Supporting bands for transformers (finding No. 15)	18.00
Chipping macadam (finding No. 17)	329.16
Total	3,810.92

Judgment for this amount will be entered. It is so ordered.

HOWELL, Judge; MADDEN, Judge; LITTLETON, Judge; and JONES, Chief Judge, concur.

41 *Judgment of the court*

October 3, 1949

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover.

It is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of three thousand eight hundred ten dollars and ninety-two cents ($3,810.92).

43 *Proceedings after entry of judgment*

On October 24, 1949, defendant filed a motion for a new trial.

On November 7, 1949, the court filed an order overruling defendant's motion for a new trial.

On December 19, 1949, on motion made therefor and allowed by the court, defendant filed its second motion for a new trial.

On April 3, 1950, the court filed the following opinion on defendant's motion for a new trial.

45 *On defendant's motion for a new trial*

April 3, 1950

WHITAKER, Judge, delivered the opinion of the court:

The Government filed a motion for a new trial in this case, which we overruled. It then filed a motion for leave to file a second motion for a new trial, asserting that the issues in this case and in the case of Moorman v. United States, 113 C. Cls. 159, then pending in the Supreme Court on certiorari to this court, were the same, and requesting that if its motion for leave to file a second motion was granted, that it be held in abeyance until the Supreme Court's decision in the Moorman case.

We granted the defendant's motion, and the Supreme Court has now decided the Moorman case, 338 U. S. 457.

Defendant says that the Moorman decision, as well as others, precludes us from overruling a finding of the contracting officer made in good faith, and that since his findings in this case are against the plaintiff, they preclude recovery.

The Moorman case involved the conclusiveness of the findings of the contracting officer on the question of the interpretation of the contract and specifications. In this case we are concerned only with the conclusiveness of his findings on questions of fact. His findings on questions of fact are alleged to be binding upon us in this case.

46 It has been said many times that findings of fact of a contracting officer, affirmed on appeal, are conclusive, unless the evidence shows he acted arbitrarily or capriciously or that his decisions were so grossly erroneous as to show bad faith.

This exception to the conclusiveness of his findings was first expressed by the Supreme Court, so far as we know, in Burchell v. Marsh, 17 Howard 344, 349. It was reiterated in Kihlberg v. United States, 97 U. S. 398; in United States v. Gleason, 175 U. S. 588, 602; in Ripley v. United States, 223 U. S. 695, 701, and in Merrill-Ruckgaber v. United States, 241 U. S. 387, and in others.

However, for his decision to be conclusive it must have been rendered "with due regard to the rights of both the contracting parties" (Ripley v. United States, supra, p. 701). In that case the court said:

"But the very extent of the power and the conclusive character of his decision raised a corresponding duty that the agent's judgment should be exercised—not capriciously or fraudulently, but reasonably and with due regard to the rights of both the contracting parties."

In other words, the contracting officer must act impartially in settling disputes. He must not act as a representative of one of the contracting parties, but as an impartial, unbiased judge. If the evidence shows he has failed so to act, there can be no doubt that we have jurisdiction to set aside his decision. Northern Pacific Railway Co. v. Twohy Bros. Co., 95 F. (2d) 220, 225; Anderson v. Imhoff, et al., 34 Neb. 335, 51 N. W. 854, 856.[1] The duty to act impartially was imposed upon him by the contract. If we are convinced he has failed to discharge this contractual obligation, then his decision cannot have that finality provided for in the contract, and we are free to decide the case as we see it.

Some contracting officers regard themselves as representatives of the defendant, charged with the duty of protecting its in-
47 terests and of exacting of the contractor everything that may be in the interest of the Government, even though no reasonable basis therefor can be found in the contract documents; but the Supreme Court has said that in settling disputes this is not his function; his function, on the other hand, is to act impartially, weighing with an even hand the rights of the parties on the one hand and on the other.

So, when a case comes before us in which the contracting officer rules against the contractor, and there is no substantial basis

[1] In the case last cited the court said:
"• • • If, however, the arbitrator so chosen should refuse to perform the duties required of him, or should collude with either of the parties, and thereby render an unjust award, the adverse party would not be bound by a decision so rendered. It is a fundamental principle in considering awards that fraud, partiality, or wilful misconduct of the arbitrator will be a sufficient cause for setting the award aside. • • •"

in the contract to support his ruling, or no substantial evidence to support it, or when his decision is grossly erroneous, we can hardly conclude that he has acted impartially; we can hardly say that he has been faithful to his duty to render impartial decisions; or, to paraphrase the language of prior decisions, that he has acted in good faith. We have said this same thing before. See the well considered discussion of this question in an opinion delivered for the court by Judge Littleton in Needles v. United States, 101 C. Cls. 535, 600–607, and see also Loftis v. United States, 110 C. Cls. 551, 630, et seq., and Mitchell Canneries v. United States, 111 C. Cls. 228, 247, and cases cited in these opinions.

We are always loath to say that a governmental official has acted in bad faith. Indeed in the many cases that have come before this court there have been but very few instances in which we have found, or thought, that the contracting officer was unfaithful to the Government. Their fidelity is beyond reproach. But it often happens that they misconceive their function. Faithful to the Government they almost always are, but frequently they are lacking in impartiality. And, yet, this is the duty the dispute clause of the contract (article 15) casts upon them.

It is a duty not easily to be discharged, we know. They are the Government's representatives, charged with the duty of seeing that the Government gets what it bargained for. Many contractors, on the other hand, bent upon making as much money as they can out of the contract, are constantly seeking ways out of doing this and doing that. Frequently, it is a constant battle—the contracting officer as the Government's representative, on the one hand, and the contractor on the other. To ask the contracting officer to act impartially when he must decide a dispute between the contractor and his employer is, indeed, putting upon
48 him a burden difficult to bear. And yet the contract requires him to do so.

So, if any case we say that the contracting officer has not acted in good faith, we mean only that he has not in good faith discharged his duties as an impartial, unbiased judge. We do not at all mean to impugn his fidelity to his employer. Indeed, it is this fidelity to his employer that makes it so difficult for him to act impartially.

We take it, then, that in deciding whether or not the contracting officer's decisions are conclusive upon us, we must decide whether or not he has acted without bias and impartially. If so, they are binding; if not, they are not binding.

In considering whether or not the contracting officer has acted impartially it is, of course, proper to take into consideration in any case, whether or not actual bias is shown, the correctness of

his findings, his relationship to the parties, the allegiance he avows, and the duties his employment by one of them casts upon him.

With these considerations in mind, we pass to the issues raised on the motion for a new trial.

In our opinion in this case rendered October 3, 1949, we gave the contractor judgment on account of ten different items. Two of the items were for extra work not ordered in writing. We were in error in awarding judgment for them, for the reason, as defendant points out in its motion for a new trial, that they were not ordered in writing, as required by article 5 of the contract. These two items were the cost of assembling lights, $16.00, and the cost of chipping macadam, $329.16.

Five of the other items were on account of errors made by the contracting officer in computing the quantities for which plaintiff was entitled to payment at unit prices. The contracting officer found that the plaintiff had dug 23,855 lineal feet of 6″ x 18″ trench; we found that plaintiff had in fact dug 27,296 lineal feet, or 3,441 lineal feet more than the contracting officer had found. We also found that the plaintiff had placed in the trenches 35,071 feet of cable, whereas the contracting officer computed 34,395 feet, a difference of 676 feet. We think the contracting officer was in error as to these two items.

49 The contracting officer found that the plaintiff had excavated only 203 cubic yards of trenches measuring more than 6″ x 18″, whereas, in fact, as we found, the contractor had excavated 629 cubic yards of such trenches. This was three times the amount found by the contracting officer. The defendant does not undertake to explain how the contracting officer, in making his computation, could have made so gross an error, one of more than 300 per cent.

The contract required plaintiff to install certain poles, which plaintiff offered in its bid to install for $70.00 a pole. At this price the total amount of plaintiff's bid seems to have brought the total cost of the work above the figure defendant's agents were authorized or wished to spend, and plaintiff was requested to reduce its price for the installation of these poles to $35.00 a pole, upon the representation that the Government had determined that no poles at all would be required. Plaintiff, on this assurance, agreed to do so. Later, it was determined that certain poles had to be installed and plaintiff was directed to install them. It submitted an invoice therefor, based upon its original bid of $70.00 a pole, but defendant refused to pay it more than $35.00 a pole, the token figure submitted by plaintiff at the Government's request.

On account of certain changes in the plans it became necessary to install a two-inch conduit under 12th Street and Ford Avenue, two of the boundary lines of the airfield. Plaintiff was ordered in writing to do this work and was requested to submit a bid therefor. Plaintiff did the work and then submitted a bid of $32.00 a lineal foot, which seems to have been an excessive price. The defendant refused to pay this price, and asked for a further proposal. The parties were never able to get together on the price to be paid and the contracting officer then fixed a $4.00 a lineal foot as the amount to be paid. The evidence establishes, and we have found, that a fair and reasonable price for doing this work was $8.00 a lineal foot, which was twice the amount allowed by the contracting officer.

50 The other items for which we rendered judgment are smaller in amount and give no indication of arbitrary action on the part of the contracting officer.

We think, however, that it is impossible to conclude that the contracting officer had acted impartially and with due regard to the rights of the plaintiff in determining that it was entitled to only $35.00 a pole for the number of poles installed, whereas plaintiff had bid $70.00 therefor and had reduced its price to $35.00 only because the contracting officer had represented that no poles were to be installed, and that he desired the reduction only to bring the cost of the work within the limits prescribed. We cannot but conclude that that decision was an arbitrary one and was rendered without any regard for plaintiff's rights or of the equities involved. Having induced plaintiff to reduce its bid from $70.00 a pole to $35.00 a pole, upon the representation that no poles were to be installed, it comes close to being unconscionable to have awarded plaintiff only $35.00 a pole for those which it later turned out had to be installed, contrary to expectations.

Again, we cannot conclude that the contracting officer acted fairly and impartially and with due regard to plaintiff's rights when he found that the amount of excavation of trenches measuring more than 6″ x 18″ was less than one-third of that actually done. Nor can we believe that he could have acted impartially when he found that the fair price of driving the conduit under 12th Street and 4th Avenue was only one-half of what we have determined was a fair price, and only one-eighth of the amount of plaintiff's original bid.

In view of his action on these three items, we are forced to conclude that he did not act with due regard to plaintiff's rights, that he did not act as an impartial, unbiased arbiter, and that his decision, therefore, must be held to have been arbitrary and capricious, and lacking in that good faith required of an unbiased, impartial arbiter.

The contracting officer's decision on all the items for which we rendered judgment was rendered at the same time. From the record as a whole we are convinced that the biased attitude which was evident in the instances which we have cited affected
51 his decision upon all the items of the claim. We therefore reaffirm the judgment heretofore rendered, with the sole exception of the extras not ordered in writing, to wit, the cost of assembling lights, $16.00, and the cost of chipping macadam, $329.16.

Defendant's motion for a new trial is allowed. The former judgment is withdrawn and judgment will now be rendered for $3,465.76.

The findings will be amended by adding a new finding at the conclusion to read as follows:

"22. The decisions of the contracting officer and the head of the department on plaintiff's claim were arbitrary and so grossly erroneous as to imply bad faith."

HOWELL, Judge; MADDEN, Judge; LITTLETON, Judge; and JONES, Chief Judge, concur.

53 *Final judgment of the court*
April 3, 1950

Defendant's motion for a new trial is allowed. The former judgment is withdrawn and judgment will now be rendered for $3,465.76.

The findings will be amended by adding a new finding at the conclusion to read as follows:

"22. The decisions of the contracting officer and the head of the department on plaintiff's claim were arbitrary and so grossly erroneous as to imply bad faith."

It is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of three thousand four hundred sixty-five dollars and seventy-six cents ($3,465.76).

55 [Clerk's Certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1950

SUPREME COURT OF THE UNITED STATES

No. 170—October Term, 1950

Order allowing certiorari filed October 9, 1950

The petition herein for a writ of certiorari to the United States Court of Claims is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.